Damai City Sdn Bhd v MCC Overseas (M) Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-1119–06 OF 2021, W-02(C)(A)-1120–06 OF 2021, W-02(C)(A)-1150–06 OF 2021 AND W-02(C)(A)-1339-07 OF 2021
RAVINTHRAN, CHE MOHD RUZIMA AND SEE MEE CHUN JJCA
7 SEPTEMBER 2022

Civil Procedure — Injunction — Application for — Application for injunction to restrain payment and/or receipt of payment under performance bond pending disposal of arbitration proceedings — Whether High Court had jurisdiction — Whether unconscionability had been proven

Damai City Sdn Bhd ('Damai') was the employer for a project with MCC Overseas (M) Sdn Bhd ('MCCO') as its main contractor. MCCO procured Malayan Banking Bhd ('MBB') to issue a performance bond ('the bond') for the sum of RM71.4m. Damai issued a notice of assignment of the bond to Maybank Investment Bank Bhd ('MIBB'). In its notice to MCCO it was informed that MBB had transferred its rights and benefits, in an assignment to MIBB. This was acknowledged by MCCO. A notice of default was issued to MCCO followed by a notice of determination. MCCO treated it as a notice of repudiation which it accepted. Damai made a demand on the bond and requested MBB to demand on the bond. However, MBB was not able to meet the call due to the assignment of the bond. Damai wrote to MIBB to make a claim on the bond. MIBB made the demand wherein it was stated that the RM71.4m was to be released to a designated account bearing the account name Infinite Holding Sdn Bhd. An arbitration was commenced between MCCO and Damai. An originating summons ('OS') was filed by MCCO for an injunction to restrain the payment and/or receipt of payment under the bond pending the disposal of arbitration proceedings. MCCO had also filed an interlocutory application on the same terms as the OS and was allowed. Hence, these appeals.

Held, allowing the appeals:

(1) The opening words in cl 34.5 of the conditions of contract ('COC') were clear that the reference to arbitration had to be anchored on a dispute or difference arising between the employer (Damai) and contractor (MCCO). It was not as wide as that contended by MCCO to include non-parties. There must be clear and specific words to make the bank a party to the arbitration clause. There were no such words in the COC and

cl 37.0 relating to performance bond did not appear as a clause under which rights and liabilities of parties could be arbitrated under cl 34.5(d) of the COC. The bond and COC were thus two separate contractual documents. Section 11(1) of the Arbitration Act 2005 ('AA') could only be invoked by parties to an arbitration. There could be no jurisdiction over the bond which involved third parties. The subject matter of the arbitration was not the bond where the injunction restrained MIBB and Damai from receiving and/or utilising any monies that may have been received from MBB under the bond. The status quo sought to be preserved must be the subject matter of the arbitration of which the bond was not. The notices to refer to arbitration made no mention of MIBB. Therefore, s 11 of the AA was wrongly invoked and the High Court judge ('HCJ') had no jurisdiction to grant the injunction (see paras 23, 27 & 35–36).

(2) The unsettled concerns did not constitute grounds to maintain unconscionability. Having made such a finding as to the unconditional on demand nature of the bond and that only an assertion of default was required, the HCJ failed to judicially appreciate that the call on the bond was lawful and consistent with the terms of the bond and the COC. The words in the bond was clear in that it was payable upon receipt of demand notwithstanding any contestation or protest by MCCO or any other third party. It was not open to the HCJ to inquire into any breach of obligations of the COC by MCCO. The rights, powers and benefit under the bond was initially assigned from Damai to MBB and then from MBB to MIBB. The assignments had nothing to do with MCCO's due performance under the COC. The high threshold test of a seriously arguable case that the only realistic inference was the existence of unconscionability, had not been established (see paras 53, 58, 60, 66 & 71).

[Bahasa Malaysia summary

Damai City Sdn Bhd ('Damai') adalah majikan untuk satu projek dengan MCC Overseas (M) Sdn Bhd ('MCCO') sebagai kontraktor utamanya. MCCO memperoleh Malayan Banking Bhd ('MBB') untuk mengeluarkan bon prestasi ('bon') dengan jumlah RM71.4 juta. Damai mengeluarkan notis penyerahan hak bon itu kepada Maybank Investment Bank Bhd ('MIBB'). Dalam notisnya kepada MCCO dimaklumkan bahawa MBB telah memindahkan hak dan kepentingannya, dalam penyerahan hak kepada MIBB. Perkara ini diakui oleh MCCO. Notis keingkaran telah dikeluarkan kepada MCCO diikuti dengan notis penentuan. MCCO menganggapnya sebagai notis penolakan yang diterimanya. Damai membuat tuntutan terhadap bon tersebut dan meminta MBB menuntut bon tersebut. Walau bagaimanapun, MBB tidak dapat memenuhi tuntutan tersebut kerana penyerahan hak bon tersebut. Damai menulis kepada MIBB untuk membuat

tuntutan ke atas bon itu. MIBB membuat tuntutan di mana ia menyatakan bahawa RM71.4 juta itu akan dikeluarkan ke akaun yang ditetapkan dengan nama akaun Infinite Holding Sdn Bhd. Timbang tara telah dimulakan antara MCCO dan Damai. Saman pemula ('SP') telah difailkan oleh MCCO untuk injunksi untuk menghalang pembayaran dan/atau penerimaan pembayaran di bawah bon itu sementara menunggu pelupusan prosiding timbang tara. MCCO juga telah memfailkan permohonan interlokutori atas terma yang sama seperti OS dan dibenarkan. Oleh itu, rayuan-rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Kata-kata pembuka dalam klausa 34.5 syarat kontrak ('COC') adalah jelas bahawa rujukan kepada timbang tara perlu disandarkan pada pertikaian atau perbezaan yang timbul antara majikan ('Damai') dan kontraktor ('MCCO'). Ia tidak seluas yang diperkatakan oleh MCCO untuk memasukkan bukan parti. Perlu ada perkataan yang jelas dan khusus untuk menjadikan bank sebagai pihak kepada klausa timbang tara. Tiada perkataan sedemikian dalam COC dan klausa 37.0 berkaitan bon pelaksanaan tidak muncul sebagai klausa di mana hak dan liabiliti pihak boleh ditimbang di bawah klausa 34.5(d) COC. Bon dan COC itu adalah dua dokumen kontrak yang berasingan. Seksyen 11(1) Akta Timbang Tara 2005 ('Akta') hanya boleh digunakan oleh pihak-pihak kepada timbang tara. Tidak boleh ada bidang kuasa ke atas bon yang melibatkan pihak ketiga. Perkara timbang tara bukanlah bon yang mana injunksi menghalang MIBB dan Damai daripada menerima dan/atau menggunakan sebarang wang yang mungkin telah diterima daripada MBB di bawah bon tersebut. Status quo yang ingin dikekalkan mestilah perkara timbang tara yang mana adalah bukan bon. Notis untuk merujuk kepada timbang tara tidak menyebut tentang MIBB. Oleh itu, s 11 Akta telah disalah guna dan hakim Mahkamah Tinggi ('HMT') tidak mempunyai bidang kuasa untuk memberikan injunksi (lihat perenggan 23, 27 & 35–36).

(2) Perkara yang tidak diselesaikan tidak menjadi alasan untuk mempertahankan ketidakwajaran. Setelah membuat penemuan tentang sifat bon tanpa syarat atas permintaan dan bahawa hanya penegasan keingkaran diperlukan, HMT gagal mengambil kira bahawa tuntutan ke atas bon itu adalah sah dan konsisten dengan terma bon dan COC. Kata-kata dalam bon itu adalah jelas kerana ia perlu dibayar apabila menerima permintaan tanpa mengambil kira sebarang bantahan atau bangkangan oleh MCCO atau mana-mana pihak ketiga yang lain. Ia tidak terbuka kepada HMT untuk menyiasat sebarang pelanggaran kewajipan COC oleh MCCO. Hak, kuasa dan faedah di bawah bon itu pada mulanya diserahkan daripada Damai kepada MBB dan kemudian daripada MBB kepada MIBB. Penyerahan hak itu tidak ada kena mengena dengan prestasi sepatutnya MCCO di bawah COC. Ujian had

ambang tinggi bagi kes yang boleh dipertikaikan secara serius bahawa satu-satunya inferens yang realistik ialah kewujudan ketidakwajaran, tidak dibuktikan (lihat perenggan 53, 58, 60, 66 & 71).]

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)
Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1; [2020] 3 CLJ 153, FC (refd)
BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd [2012] 3 SLR 352, CA (refd)
Cex v Cey and another [2021] 3 SLR 571, HC (refd)
Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd and another action [2010] MLJU 2140, HC (distd)
Fiona Trust & Holding Corporation and others v Privalov and others [2007] 4 All ER 951, HL (distd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1, FC (refd)
KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC [2020] MLJU 85; [2020] 1 LNS 479, CA (refd)
Karya Lagenda Sdn Bhd v Kejuteraan Bintai Kindenko Sdn Bhd & Anor [2008] 6 MLJ 636, FC (refd)
Kejuteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442, CA (refd)
Metrod (Singapore) Pte Ltd v GEP II Beteiligungs Gmbh & Anor [2013] MLJU 602, HC (distd)
NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] 2 SLR(R) 565, CA (distd)
Obnet Sdn Bhd v Telekom Malaysia Bhd [2019] 6 MLJ 707, CA (refd)
Owen (Edward) Engineering Ltd v Barclays Bank International Ltd [1978] QB 159; [1978] 1 All ER 976, CA (refd)
Sigur Ros Sdn Bhd v Malayan Banking Bhd & Anor [2013] MLJU 1622, HC (refd)
Sulzer Pumps Spain, SA v Hyflux Membrane Manufacturing (S) Pte Ltd and another [2020] SGHC 122; [2020] 5 SLR 634, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 10, 10(1), 11, 11(1), (1)(a), (1)(b)

Appeal from: *MCC Overseas (M) Sdn Bhd v Malayan Banking Bhd & Ors* [2021] MLJU 959 (High Court, Kuala Lumpur)

Cyrus Das (with T Sudhar, Tan Ch'eng Leong, Dawn Wong Keng Jade and Ng Yee Lin) (Steven Thiru & Sudhar Partnership) in Appeal Nos W-02(C)(A)-1119–06 of 2021, W-02(C)(A)-1120–06 of 2021,

W-02(C)(A)-1150–06 of 2021 and W-02(C)(A)-1339–07 of 2021 for the appellant.

Tommy Thomas (with Michael Yap Chih Hong and Wong Siong Lung) (Tommy Thomas) in Appeal Nos W-02(C)(A)-1119–06 of 2021, W-02(C)(A)-1120–06 of 2021, W-02(C)(A)-1150–06 of 2021 and W-02(C)(A)-1339–07 of 2021 for the first respondent.

Poh Choo Hoe (with Choy Kay Chun) (Shook Lin & Bok) in Appeal No W-02(C)(A)-1339–07 of 2021 for the second respondent.

Yap Vern-Chieh Gary (with Hemashini Kurup) (Ramesh Dipendra Jeremiah Law) in Appeal No W-02(C)(A)-1339–07 of 2021 for the third respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] There are four appeals before the court, namely, Appeals 1119, 1120, 1150 and 1339. They relate to an originating summons ('OS') filed by the first respondent/plaintiff who is MCC Overseas (M) Sdn Bhd ('MCCO') for an injunction to restrain the payment and/or receipt of payment under a performance bond ('bond') pending the disposal of arbitration proceedings.

[2] The appellant is the third defendant in the OS and is Damai City Sdn Bhd ('Damai'). Malayan Banking Bhd ('MBB') is the second respondent/first defendant, and Maybank Investment Bank Bhd ('MIBB') is the third respondent/second defendant. MCCO had also filed an interlocutory application on essentially the same terms as the OS and heard on an ex parte basis which was allowed. Prayer 2 of encls 1 and 2 were ultimately allowed whereby an injunction to restrain MIBB and Damai from receiving and/or utilising any monies that may have been received from MBB under the bond pending the disposal of the arbitration proceedings. Damai's application in encl 28 to set aside the ex parte order was dismissed.

[3] Pursuant to an order of this court dated 1 September 2021, all the appeals have been consolidated and to be heard together. Parties referred to the record of appeal in Appeal 1339. The principal focus of submissions was on Appeal 1339 as that would effectively dispose Appeal 1119 and Appeal 1150 and to a certain extent, Appeal 1120, which is the encl 28 application to set aside.

FACTS

[4] The facts are set out briefly.

[5] Damai is the employer for the eight Conlay project ('project') with MCCO as its main contractor for a lump sum contract price of RM1.428 billion. The project would entail the construction and completion of the building of three high-rise towers and a retail podium. Tower A and B are luxury branded residences while Tower C is to house a five-star hotel.

[6] Clause 1(a) of the letter of acceptance dated 19 May 2017 ('LA') issued by Damai to MCCO stated that parties will execute and complete the works in accordance with the LA and the agreement and conditions of PAM contract 2006 (without quantities). The PAM contract duly signed appears as Document F to the LA and will be referred to as the conditions of contract (CoC).

[7] As per cl 37 CoC, MCCO procured MBB to issue a performance bond dated 29 December 2017 for the sum of RM 71.4m. Clause 3(i) states that if the contractor (MCCO) shall in respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor (MBB) shall pay to the employer (Damai) up to RM 71.4m within five working days upon receipt of demand notwithstanding any contestation or protest by the contractor. Clause 3(v) then states the benefit of the guarantee and all rights and powers be assigned to MBB on the issue date. Damai had also on 29 December 2017 issued a notice of assignment to MCCO wherein MCCO consented.

[8] On 2 August 2019, Damai issued a notice of assignment of the bond to MIBB. In its notice to MCCO it was informed that MBB had transferred its rights and benefits, in the assignment to MIBB. This was acknowledged by MCCO.

[9] By letter dated 30 July 2020, a notice of default was issued to MCCO followed by a notice of determination dated 24 August 2020. MCCO treated it as a notice of repudiation which it accepted.

[10] On 12 August 2020, Damai made a demand on the bond. Damai then by letter dated 14 August 2020 requested MBB to demand on the bond. However, MBB was not able to meet the call due to the assignment of the bond on 29 December 2017. On 14 August 2020, Damai wrote to MIBB to make a claim on the bond. MIBB made the demand dated 17 August 2020 wherein it was stated the RM 71.4m was to be released to a designated account bearing the account name Infinite Holding Sdn Bhd ('Infinite').

[11] On 15 March 2021 an arbitration was commenced between MCCO and Damai and the evidential hearing has since concluded.

OUR DECISION

Jurisdiction

[12] The application is made pursuant to s 11(1)(a) and (b) of the Arbitration Act 2005 ('the AA 2005') which states as follows:

> 11 Arbitration agreement and interim measures by High Court
>
> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to —
>
> (a) maintain or restore the status quo pending the determination of the dispute;
>
> (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
>
> (c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
>
> (e) provide security for the costs of the dispute.
>
> (2) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.
>
> (3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[13] The HCJ referred to the decision of this court in *KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC* [2020] MLJU 85; [2020] 1 LNS 479 as follows:

> [36] The exercise of discretionary power under s 11 requires a careful examination of the relevant material facts against the allegations made, with a cautious restrain of determining the dispute in any definitive manner since that is a matter for determination at the arbitration and not for the court. The court is only approached to grant an interim remedy which will ultimately support or aid the arbitration.
>
> [37] Similar views were expressed in *Metrod (Singapore) Pte Ltd v GEPA II Beteiligungs GmbH & Anor* [2013] MLJU 602; [2013] 1 LNS 324, that an application for interim reliefs are intended to be interim in nature and not permanent, and that they are intended to support, assist, as well as facilitate the arbitration proceedings. See also *Jiwa Harmoni Offshore Sdn Bhd v Ishi Power Sdn Bhd* [2009] 1 LNS 849; *Cobrain Holdings Sdn Bhd v GDP Special projects Sdn Bhd* [2010] MLJU 2140; [2010] 1 LNS 1834; *Interactive Brokers LLC v Neo Kim*

Hock & Ors [2014] 8 CLJ 747. In *Obnet Sdn Bhd v Telekom Malaysia Bhd*, the Court of Appeal had held:

...

[38] Therefore, in the exercise of discretion of whether to grant the interim measure sought, the High Court must consider whether such interim measure will aid, support or facilitate the arbitral proceedings, that such measure will no impede the arbitral proceedings.

[14] The HCJ then found as follows at para 43:

[43] Since MCCO has referred the dispute with DC to arbitration, I am satisfied that the application has met the threshold requirement of s 11 of the AA particularly because it is aimed at preserving the status quo to avoid payout of the bond as already demanded by DC and then again by MIB pending resolution of the contractual disputes between MCCO and DC via arbitration.

[15] The learned HCJ was thus of the view that the threshold requirement had been met where the injunction was aimed at preserving the status quo pending resolution of the disputes by arbitration between MCCO and Damai.

[16] It was submitted by Damai that the High Court had no jurisdiction under s 11(1) of the AA 2005 in relation to the call on the bond by MIBB which is a non-party to the arbitration agreement between MCCO and Damai. The call on the bond did not fall within the scope of the arbitration agreement as provided in cl 34.5 CoC. *Sigur Ros Sdn Bhd v Malayan Banking Bhd & Anor* [2013] MLJU 1622 was cited for the proposition that the bond and CoC are separate documents and *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 was cited for the proposition that the jurisdiction of the court is confined to the parties to the arbitration agreement.

[17] MCCO contended that the issue of jurisdiction was never raised in the court below. Counsel in turn referred to a series of cases that states the courts have jurisdiction in situations of third parties. The cases were *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565, *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd and another action* [2010] MLJU 2140 and *Metrod (Singapore) Pte Ltd v GEP II Beteiligungs Gmbh & Anor* [2013] MLJU 602.

[18] It was further contended the bond is an integral part of the LA and the meaning of 'any dispute or difference' in the opening words to cl 34.5 CoC is very wide and the words 'any matter of whatsoever nature' would bring the bond within the meaning of 'as a matter to be arbitrated'.

[19] With regard to jurisdiction, we note that Damai had raised the fact of MBB and MIBB being non-parties to the arbitration agreement and that the arbitration was between MCCO and Damai, in its submissions to the High Court. Refer to encl 166/1122–1125. To a question from the court during oral submissions whether jurisdiction was argued specifically, the answer was 'No'. However, at the same time, MCCO did acknowledge that a jurisdictional issue may be raised at any time. This would be the correct position in law. We need not look further than *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 3 CLJ 153 where the Federal Court said at p 11 (MLJ); p 192 (CLJ):

> [71] ... The issue of whether a decision is appealable is a jurisdictional matter. It concerns the jurisdiction of the Court of Appeal, and a question of jurisdiction can be raised at any time ...

[20] Hence, we can consider the jurisdictional issue vis a vis s 11(1) of the AA 2005.

[21] We start by noting that the purpose of s 11 is to facilitate parties to an arbitration and not otherwise. This has been stated in *KNM Process* referred to earlier. In *Obnet Sdn Bhd v Telekom Malaysia Bhd* [2019] 6 MLJ 707 at p 717, this court stated:

> [26] It must then follow that in principle s 11 of the AA 2005 is designed to support and facilitate the arbitral process and not to displace it. The approach, in the context of s 11, must be not to encroach on the procedural powers of the arbitrators but to reinforce them (see *Channel Tunnel Group Ltd v Balfour Beatty Construction* [1993] AC 334). As stated by s 11 itself, the relief sought must be of an interim nature and, by implication, not permanent. It is plain that the interim measures are not intended to displace the powers of the arbitrator. They are certainly not there for the High Court to exert some supervisory function over the arbitral process. In the circumstances, the learned judge ought to have declined to order discovery.

[22] The enabling clause to refer disputes to arbitration is housed in cl 34.5 CoC as follows:

> Disputes referred to arbitration
>
> 34.5 In the event that any dispute or difference arises between the Employer and Contractor, either during the progress or after completion or abandonment of the Works regarding;
>
> 34.5(a) any matter of whatsoever nature arising under or in connection with the Contract;
>
> 34.5(b) any matter left by the Contract to the Discretion of the Architect;
>
> 34.5(c) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to;

34.5(d) the right and liabilities of the parties Under cl 25.0, 26.0, 31.0 or 32.0 or

34.5(e) the unreasonable withholding of Consent or agreement by the Employer or Contractor,

then such disputes or differences shall be referred to arbitration.

[23] We find the opening words in the aforesaid clause to be clear that the reference to arbitration has to be anchored on a dispute or difference arising between the employer (Damai) and contractor (MCCO). It is not as wide as that contended by MCCO to include non-parties. The reference in cl 34.5(d) that the dispute or difference can be regarding 'the rights and liabilities of the parties under cl 25.0, 26.0, 31.0 or 32.0' does not cover the bond which comes under cl 37.0. The bond may be an integral part of the LA as per its cl 4 and even CoC, but it does not expand to rendering it capable of a reference to arbitration where MIBB is a non-party.

[24] MCCO had contended that an arbitration agreement had to be construed widely and referred to *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 4 All ER 951. The case concerned the scope and effect of arbitration clauses in eight charterparties made between owners of vessels and charterers. The charterparties allowed for 'any dispute arising under this charter' to be referred to arbitration. The owners sought to rescind the charterparties, including the arbitration agreements on grounds that the charters were procured by bribery. The House of Lords in dealing with the question of whether the arbitration clause covered the question of whether the contracts had been procured by bribery, held that the arbitration clause should be construed in accordance with the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

[25] We find that our cl 34.5 CoC is a specific arbitration clause which expressly refers to a dispute or difference arising between 'the Employer and the Contractor'. This is to be contrasted with the arbitration clause in *Fiona Trust* which was general in nature where it was 'any dispute arising under this charter'.

[26] In *Sigur Ros*, the following was said:

> [68] Having heard counsel at length and having questioned them, it appears to this court that the BG and the contract comprise two separate contractual documents. The BG is between the bank, D1 and D2 while the contract is between the plaintiff and D2. In determining whether the BG is the subject matter of arbitration, this court on the basis of the series of cases discussed above, has no hesitation in concluding that the BG is not the subject matter of the arbitration agreement as

contained in the contract. The series of cases ranging from *TW Thomas & Co Ltd v Portsea Steamship Company Ltd* [1912] AC 1 through to *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm); [2010] 1 All ER 1143 are authority for the proposition that in order to incorporate the effect of an arbitration clause in one agreement into another agreement, there must be very clear and specific words to that effect. In short the third party must be seen to have expressly agreed to arbitrate. A distinction is made between single party and two party contractors. A much stricter test is applicable for two party contracts as is the case here.

[69] It would appear from the various cases cited above that the principle of autonomy of the BG precludes the court from simply incorporating the arbitration cl into the BG simply because there is a reference to the same. It would require clear and specific words to make the bank a party to the arbitration clause which presently is only applicable between the plaintiff and D2. As for the case of *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* (above) it appears that in that case the parties had agreed to mutually submit to the jurisdiction of the arbitral tribunal in relation to the retention bond. Additionally the bank there had taken a neutral stance, unlike the present case where the bank maintains that the guarantee has expired.

[70] Given these circumstances, I am satisfied that the BG is to be considered or construed separately from the contract. The issue of the validity does not, to my mind, amount to a dispute arising out of or in connection with the charterparty agreement. The BG is autonomous from the charterparty.

[27] Thus, there must be clear and specific words to make the bank a party to the arbitration clause. We do not find such words in CoC and cl 37.0 relating to performance bond does not appear as a clause under which rights and liabilities of parties can be arbitrated under cl 34.5(d), even if assuming for a moment that cl 34.5(d) can apply. The bond and CoC are thus two separate contractual documents.

[28] In *Jaya Sudhir*, leave to appeal was granted on two questions of law and specific reference is made to the question of 'whether the requirements of s 10 of the Arbitration Act 2005 must be met by a party litigant seeking an injunction to restrain the prosecution of an arbitration to which he is not a party but which would affect his proprietary rights'.

[29] Section 10(1) of the AA 2005 relates to stay of proceedings and states as follows:

10 Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[30] The Federal Court said at pp 19 and 22:

> [32] By way of emphasis, an important point that we would like to make at this juncture is that in this case it is as plain as a pikestaff that there is no arbitration agreement as between the appellant and the first respondent as defined in s 9 of Act 646, whether in relation to the subject matter of the appellant's claim in this action or otherwise. The appellant is also not a party to the arbitration proceedings as defined in s 2 of Act 646. It is thus not possible for the appellant or the first respondent to refer this action to arbitration. The appellant's claim in this action and the injunction application therefore do not come within the ambit and scope of sub-s 10(1) of Act 646.
>
> [41] We will go further to say that, upon reading the judgment of the Court of Appeal on this point, the conclusion at which we are constrained to arrive is this; that the powers of court in relation to arbitral proceedings have been expressly prescribed in Act 646. Besides s 10, these powers are provided in ss 11, 13(7), 15(3), 18(8), 29, 37, 41, 44(1), 44(4), 45 and 46 of Act 646. The provisions are clearly of utility to parties to arbitration proceedings only as it allows them to make various applications to the court relating to their arbitral proceedings upon which the court is empowered to make certain orders. The Court of Appeal having decided that the learned judge had erred in his finding that Act 646 did not apply to the appellant's injunction application (para [43]) and the said injunction application was subject to the clear and express provisions of Act 646 in particular sub-ss 10(1), 10(3) and s 8, ought to have deliberated on the effect of its ruling on these provisions. Such deliberation however is notably absent from the Court of Appeal's judgment.

[31] Although the Federal Court was dealing with s 10(1), it also stated in para 41 the powers of the court in relation to arbitral proceedings was also provided in s 11(1) and are of utility to parties to arbitration proceedings. The appellant there was not a party to the arbitration agreement and the court said it was not possible for the appellant to refer the matter to arbitration. It is therefore clear that the jurisdiction of the High Court under s 11(1) of the AA 2005 is limited to parties to the arbitration agreement and the arbitration.

[32] We note too that the reference to *KNM Process* by the HCJ was correct in the sense that that the court will grant an interim remedy which will ultimately support or aid an arbitration. However, we take the view that the subject matter of the arbitration there was that as per the dispute in the agreement. This is apparent from the following paragraphs:

> [39] In this appeal, the appellant had, on 6 December 2017, filed an action against the respondent (and the issuing bank) challenging the simultaneous calls on the guarantees on the basis that the calls are fraudulent and/or unconscionable and seeking both injunctive and declaratory reliefs. The details of that claim (High Court Civil Action WA-22C-110–12 of 2017) may be seen at pp 135–143 of the record of appeal.
>
> [40] The respondent invoked s 10 of the Arbitration Act 2005 for a stay of that civil action. The order was granted by consent, and the injunctive reliefs were then

sought by the appellant as interim measures under s 11(1)(f) and (h). The reliefs were sought for the primary purpose of maintaining status quo between the parties since the disposal of the substantive dispute of the parties, that is, whether the respondent's call on the guarantees was fraudulent and/or unconscionable call (the subject matter of the claim in High Court Civil Action WA-22C-110–12 of 2017) would now be resolved or finally determined by way of arbitration. We note that the parties relied on, amongst others, the affidavits and affidavits in reply that were filed in relation to the stay application for the purpose of the application for the present interim injunctive measures.

...

[42] The basic claim, in fact, the whole claim of the appellant was about an alleged fraudulent, unconscionable and/or unlawful call on the guarantees. That was the dispute. The respondent had moved the court to direct that dispute be referred to arbitration, this was in keeping with the arbitration agreement in the underlying contracts. The appellant then moved for an interim injunction on the calls so that status quo may be maintained pending arbitration. The application was refused not on the ground that status quo was not made out, but because a strong prima facie case was not established.

[43] We are of the view that since s 11 has itself set the parameters upon which interim measures may be granted, those principles must be given due and proper regard and application. The interim injunctive measure that the appellant was seeking falls within the second category of cases that Lord Mustill talked about and discussed above; that is, to maintain the status quo pending arbitration so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators cannot adequately remedy.

[33] MCCO had referred to *NCC International AB*, *Cobrain* and *Metrod* for the principle that the court was vested with jurisdiction to order interim measures even over third parties. In *NCC International AB*, it was said at p 576:

[41] In summary, under the IAA regime, although the court has concurrent jurisdiction with the arbitral tribunal to order interim measures, the court will nevertheless scrupulously avoid usurping the functions of the arbitral tribunal in exercising such jurisdiction and will only order interim relief where this will aid, promote and support arbitration proceedings. We concur with the view expressed in Leslie K H Chew, *Singapore Arbitration Handbook* (LexisNexis, 2003) at p 105 that:

> Section 12(7) read with s 12(1) of the IAA merely provides an alternative for the parties to apply to the High Court if applications for interlocutory relief may not be conveniently made to the tribunal or if it is more expedient to do so in court.

Examples of such situations include those where third parties over whom the arbitral tribunal has no jurisdiction are involved, where matters are very urgent or where the court's coercive powers of enforcement are required (see David St John Sutton & Judith Gill, *Russell on Arbitration* (Sweet & Maxwell Limited, 22nd Ed, 2003) at paras 7–138).

[34] It was submitted that *Cobrain* and *Metrod* also said the same when it

referred to *NCC International AB*. However, the fact of the matter is that the above three cases all dealt with parties to an arbitration agreement. In *NCC International AB*, the appellant was the main contractor and the respondent was the supplier of ready-mixed concrete to the appellant. In *Cobrain*, the plaintiff was the contractor and the defendant a design and build contractor, in *Metrod*, the plaintiff entered into a sale and purchase agreement to sell shares to the first defendant. The interim measures sought in all three cases were not directed at restraining a claim by a third party, which is MIBB.

[35] We are of the view that s 11(1) of the AA 2005 can only be invoked by parties to an arbitration. There can be no jurisdiction over the bond which involves third parties. The subject matter of the arbitration is not the bond where the injunction restrains MIBB and Damai from receiving and/or utilising any monies that may have been received from MBB under the bond. The status quo sought to be preserved must be the subject matter of the arbitration of which the bond is not. The notices to refer to arbitration made no mention of MIBB.

[36] We therefore find that that s 11 of AA 2005 was wrongly invoked and the HCJ had no jurisdiction to grant the injunction. On this ground alone, the appeal is allowed.

UNCONSCIONABILITY

[37] For completeness, we will now deal with the issue of unconscionability.

[38] Damai submitted the HCJ had applied the wrong test in granting the injunction, where it was said the test in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 as opposed to the test in *Sumatec* was applied. We were referred to paras 46 and 90–91 of the grounds.

[39] In para 46 of the grounds, it was stated as follows:

> [46] Put simply, it is essential to either establish fraud or unconscionability that is supported with strong cogent evidence to restrain the payout or receipt of moneys under an on-demand performance bond interlocutorily in satisfaction of the balance of convenience after having determined that there are indeed serious issues to be tried between the parties to the contract.

[40] Paragraph 90 dealt with the HCJ's unsettled concerns which cumulatively constituted special circumstances that made it unsafe and unconscionable for MIBB to encash the bond.

[41] At para 91, it was then said:

[91] In the premises, I find and hold that MCCO has made out a meritorious application as well as interlocutory application. Put simply, there are serious issues in relation both to the contract and bond to be tried and the balance of convenience or justice favours MCCO by reason of unconscionability if the bond is permitted to be encashed at this moment in time.

[42] We are unable to agree with Damai's contention that the wrong test had been applied. We find that in para 45 of the grounds, the HCJ was aware and mindful that both parties were relying on *Sumatec* and the HCJ then went on to quote extracts from the case. The test in *Sumatec* is that of a seriously arguable case that the only realistic inference is the existence of unconscionability which would basically mean establishing a strong prima facie case. The HCJ had in mind strong cogent evidence although he may have gone to say balance of convenience and serious issues to be tried which is the test in *American Cynamid*. Underlying it was still strong cogent evidence. The issue really is, whether on the totality of the evidence, unconscionability has been proven, rather than refer to some phrases used here and there by the HCJ.

[43] In *Sumatec*, the Federal Court agreed with this court in *Kejuteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442 and the principles enunciated there. It went on as follows at p 18:

The Court of Appeal agreed with *Focal Asia* that the principle recognising unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense. We also agree with these other holdings of the Court of Appeal:

(a) in my view, consonant with the principle as laid down by my learned brother, unconscionability is a doctrine which allows courts to deny enforcement of a contract because of abuses arising out of the contract;

(b) in my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct; and because the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances;

(c) a distinction must be drawn between an injunction to restrain a bank/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction;

(d) to restrain a beneficiary from making a demand on the bond (which is governed by the underlying contract between the parties); and

(e) all the facts and circumstances surrounding the demands made by the first respondent on both the performance bonds were so lacking in good faith and amounted to unconscionable conduct that it warranted court intervention by way of injunction to avoid injustice. The demands on the bonds were premature, invalid and of no effect.

[44] It then stated at para 42:

> [42] So, to answer the question posed to us, we say yes, unconscionability may now be raised as a distinct ground, to restrain a beneficiary under a bank guarantee or performance bond.

[45] The Singapore Court of Appeal in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 recognised at p 360 that unconscionability, as distinct from fraud, is a ground upon which the court can grant an injunction restraining a beneficiary of a performance bond from calling on the bond. At p 362 it stated that:

> [19] The elements of unconscionability are also fairly uncontroversial, and have been variously stated to include elements of abuse, unfairness and dishonesty.

[46] At p 363 the court laid down a high threshold for establishing unconscionability and the reasons for such a threshold. This was said:

> [20] Of greater significance in the context of the present appeal is the necessary threshold of unconscionability that has to be established before the court will exercise its discretion to grant an injunction. Indeed, as we shall see, it is precisely this threshold that constitutes the key to resolving the relevant tension that exists, which tension we will address in a moment (see generally below at [26]–[46]). It is important to note, at the outset, that the law in this regard is settled. Simply put, the threshold is a high one, and the burden that the applicant has to discharge is to demonstrate a strong prima facie case of unconscionability (see, for example, Dauphin at [57]). The question in this appeal is really a question of defining the contours of that burden, having regard to the relevant facts.
>
> [21] When determining if a strong prima facie case has been made out, the entire context of the case must be thoroughly considered, and it is only if the entire context of the case is particularly malodorous that such an injunction should be granted. We must emphasise that the courts' discretion to grant such injunctions must be sparingly exercised and it should not be an easy thing for an applicant to establish a strong prima facie case.
>
> [22] The reason for setting the barrier at such a high level is that the equitable remedy of the interim prohibitive injunction is a very harsh one. It restricts the person in whose favour the performance bond was issued ('the beneficiary') from doing that which he was entitled by agreement of the parties to do, and which he in all probability had bargained for during the negotiations leading up to the contract concerned. In essence, he would be prevented from enforcing a substantive right which he had contracted for.

[47] Unconscionability is thus a ground to deny the enforceability of a bond on elements of abuse, unfairness and dishonesty and the threshold for so establishing is high.

[48] The HCJ in para 90 of the grounds had summed up the unsettled concerns raised in paras 55, 61–62, 68–77, 84 and 89 which cumulatively constituted special circumstances and thereby unconscionable for the bond to be encashed.

[49] Damai had referred to a recent Singapore High Court case of *Cex v Cey and another* [2021] 3 SLR 571 to contend that those unsettled concerns did not fall within any of the recognised grounds of unconscionable conduct. MCCO in turn raised the complaint that this case was never raised in the court below, although it was already then available. It was submitted that the passage as cited was not fully reproduced.

[50] Although *Cex* was not referred to in the court below, we do find it useful in setting out what may possibly constitute unconscionability. We are indeed mindful that even if the HCJ's unsettled concerns do not fall within what was set out in *Cex*, it is not the be all and end all, as ultimately it revolves around the factual matrix,

[51] We now set out below the passage as cited by Damai and MCCO. This may be seen at p 577:

> [11] ... From an analysis of the authorities, the following framework may be discerned for evaluating whether an injunction restraining a performance bond should be granted on the ground of unconscionability:
>
> (c) Evaluate whether the 'overall tenor and entire context of the conduct of the parties support a strong prima facie case of unconscionability' (BS Mount Sophia at [40]), unconscionability having been broadly (but not exhaustively) described to involve elements of unfairness and conduct lacking in good faith: *Raymond Construction* at [5]. These elements have most commonly manifested in the following manner:
>
> (i) calls for excessive sums;
>
> (ii) calls based on contractual breaches that the beneficiary of the call itself is responsible for;
>
> (iii) calls tainted by unclean hands, eg, supported by inflated estimates of damages or mounted on the back of selective and incomplete disclosures;
>
> (iv) calls made for ulterior motives; and
>
> (v) calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.
>
> [12] I pause to clarify three things about the factual matrices I have just described in the para above. First, this is not an exhaustive list of circumstances where unconscionability arises. The list is not and will probably never be closed. Indeed, the present case involves a factor that is not captured by any of the above listed

A categories (see [68]). These factors are simply circumstances that have recurred often enough. Second, no single factor is dispositive. The weight attached to each factor will vary from case to case depending on the strength of the evidence. Every case must be examined with careful regard to the entire context, rather than devolve into a pedantic inquiry into each and every factor. The corollary to this is that the B factors listed above should not be taken as a checklist to be ritually attended to. These are not a set of conjunctive requirements to satisfy before unconscionability is made out. Third and finally, a factor may go towards establishing unconscionability but the absence of a given factor does not necessarily whitewash the beneficiary's conduct. For example, calls for sums which are disproportionate to C the actual or potential losses claimed may be unconscionable. It does not follow, however, that a call for a sum which correspond reasonably with the losses claimed is, of itself, conscionable.

[52] As noted, the above is not an exhaustive list and it behoves upon this D court to determine if unconscionability has been established on the facts of the case.

[53] We now revert to the unsettled concerns. Paragraphs 55 dealt with the validity of the bond, 61 with cl 37.1 of CoC being incongruous with the E provision in the bond, 68–77, 84 and 89 with the assignments. We find that these unsettled concerns as set out do not constitute grounds to maintain unconscionability.

[54] The HCJ found the bond to be an unconditional on demand bond and F all that is required for purposes of demand is simply the assertion of the default on the part of MCCO. This was said in para 60:

> [60] Consequently, I find and hold that the bond is an on-demand performance bond and all that is required for purposes of the demand thereon is simply the assertion of the default on the part of MCCO. This has been made by MIB on G 17 August 2020. As the result, MB as the surety is legally obliged to pay and no injunction lies against the surety; see *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449 and *Fadzly Enterprise Sdn Bhd v Small Medium Enterprise Development Bank Malaysia Bhd* [2017] MLJU 1551; [2017] 1 LNS 1305. The only relief against payout is fraud but which is inapplicable here.

H

[55] In *Owen (Edward) Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159; [1978] 1 All ER 976 it was said at pp 169 and 171 that:

> A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been I long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit.
>
> ...

> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

[56] This case stands for the proposition that a performance guarantee or bond stands on a similar footing to a letter of credit, to be honoured as per its terms.

[57] The bond in question is to be payable notwithstanding any contestation or protest from MCCO. This may be seen in para 3(i) as follows:

> If the contractor (unless relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the contract or commit any breach of his obligations thereunder, then the guarantor shall pay to the employer up to and not exceeding the sum of Ringgit Malaysia Seventy One Million and Four Hundred Thousand Only (RM71,400,000) ('the guaranteed sum'). This guaranteed sum shall be payable to the employer within five working days upon receipt of demand in writing notwithstanding any contestation or protest by the contractor or by the guarantor or by any other third party. Provided always that the total of all partial demands so made shall not exceed the guaranteed sum and the guarantor's liability to pay the contractor as aforesaid shall correspondingly be reduced to any partial demand having been made as aforesaid.

[58] Having made such a finding as to the unconditional on demand nature of the bond and that only an assertion of default was required, the HCJ failed to judicially appreciate that the call on the bond was lawful and consistent with the terms of the bond and CoC.

[59] The HCJ found that cl 37.1 CoC to be incongruous with the bond. This was because there is no mention in cl 37.1 that the bond must be payable upon demand whereas cl 37.1 states the bond to be security for the performance and obligations of MCCO. Clause 37.1 states as follows:

> [37.1] The Contractor shall before the Date of Commencement of the Works, submit to the Employer a Performance bond for a sum equivalent to the percentage stated in the Appendix as a security for the due performance and observance by the Contractor of his obligations under the Contract up to Practical Completion of the Works.

[60] We find the words in the bond to be clear in that it is payable upon receipt of demand notwithstanding any contestation or protest by MCCO or any other third party. It is not opened to the HCJ to inquire into any breach of obligations of CoC by MCCO. In *Karya Lagenda Sdn Bhd v Kejuteraan Bintai Kindenko Sdn Bhd & Anor* [2008] 6 MLJ 636 it was said as follows:

> [12] Therefore once a valid demand is issued the second respondent bank in the instant case must make payment to the first respondent because the bank has no right to object since the appellant's grievances are matters that must be adjudicated elsewhere ...
>
> [13] The clause 'notwithstanding any contestation or protest by the contractor' in the third question shows clearly that payments would only be made by the bank once a valid letter of demand is received and it is irrelevant whether there is any protest or contestation. The contractor's remedy is to sue in damages. The implication of such a clause is that payment must be made upon receipt of a valid demand.

[61] The same too was said in *Sumatec* at p 13:

> [24] The above quoted passage from Harbottle was also used by our then Supreme Court in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283, as a basis to hold that a performance bond, which the Supreme Court likened to a pure on-demand guarantee, is independent of the underlying contract between the disputing parties, and that it is not open for the courts to inquire into any breach of obligations in the underlying contract. The Supreme Court found that it was wrong for the High Court to allow the interim injunction to restrain the appellant/purchaser from receiving the moneys under the said performance bond.

[62] This thus deals with the unsettled concern relating to the validity and incongruity of the bond.

[63] Paragraphs 68–77, 84 and 89 are the unsettled concerns relating to the assignments.

[64] The first assignment is dated 29 December 2017 and was from Damai to MBB (encl 181/108–109). It is not disputed that it was with the consent of MCCO. Here, MCCO consented to 'remit the Proceeds direct to the Assignee at such account as may be specified by the Assignee as and when such Proceeds shall become due and payable under the provisions of the Contract/Performance bond'.

[65] The second assignment is dated 2 August 2019 and was from MBB to MIBB (encl 168/174–175). This was with the acknowledgment of MCCO as follows:

ACKNOWLEDGEMENT

We hereby acknowledge receipt of the notice of assignment dated 2 August 2019 ('Notice of Assignment') and that the assignment of the Performance bond and the Proceeds (both terms as defined in the Notice of Assignment) in favour of Maybank Investment Bank Bhd has been intimated to us by the delivery of the Notice of Assignment.

Yours faithfully

For and on behalf

MCC Overseas (M) Sdn Bhd

(Company No. 239687-D)

sgd

Danny Tsen

c.c MAYBANK INVESTMENT BANK Bhd

(Company No. 15938-H)

as Transferee

[66] The rights, powers and benefit under the bond was thus initially assigned from Damai to MBB and then from MBB to MIBB. The assignments have nothing to do with MCCO's due performance under CoC. We note that the assignments were an internal arrangement where MCCO was notified and had given its consent to the first assignment and at the very least, had knowledge of the second assignment. There could therefore be no change of purpose. In any event, this is not relevant to a call on the bond.

[67] When the demand by MIBB was made, the objection was towards the proceeds being paid to the account name of Infinite. The contention that the proceeds being paid to Infinite was without its knowledge is not relevant as this was an internal financing arrangement. The proceeds now being paid to Infinite is of no concern to MCCO as the nature of its obligation and liability as the guarantor was not altered. For instance, the call on the bond would remain the same. By virtue of the assignments, nothing had changed except for the beneficiary. The allegation that the proceeds would disappear is not tenable as there would be a final accounting between the employer and the contractor as is consistent with cl 30.10 CoC.

[68] There were also issues raised on the complex web of financial arrangement and that the purpose of the bond after the second assignment was to reduce Infinite's financial exposure. For the reasons given above, these are Damai's internal affairs with regard to its funding and financing arrangements.

[69] In *Sulzer Pumps Spain, Sa v Hyflux Membrane Manufacturing (S) Pte Ltd and another* [2020] SGHC 122; [2020] 5 SLR 634, it was said that even if there was restructuring, it would not be a reason to grant an injunction in the absence of unconscionablity. At p 649 this was said:

> [53] However, the fact that the first respondent is in the midst of restructuring, or even if hypotheticall on the verge of insolvency, would not be reason to grant an injunction if unconscionability is not made out. The rationale for the strict threshold espoused at para [31] above bears repeating: a performance bond is a security that has been bargained for, and the court should not disrupt the status quo unless the applicant meets the threshold of proving either unconscionability or fraud. Parties calling on bonds are not to be treated differently merely because they are in the midst of a restructuring. The fact that the obligor may be exposed to the financial constraints of the beneficiary is not good enough reason to bar the call if no other reason exists. This is part and parcel of the contractual arrangement that they have made between themselves in arranging for the performance bond.

This case essentially illustrates that whatever the exposure to financial constraints there may be, that per se is not good enough reason to bar the call.

[70] In para 85 of the grounds, the HCJ had found no dishonesty or lack of bona fides on the part of Damai in relation to the allegations of default and notice of determination with the pre-meditated objective to demand on the bond. Refer also to para 78.

[71] We find that the high threshold test of a seriously arguable case that the only realistic inference is the existence of unconscionability, has not been established.

MBB and MIBB

[72] Insofar as MBB is concerned, the prayer to injunct it from paying out was not allowed. There is no appeal from MCCO on this.

[73] With regard to MIBB, it did not appeal against the decision of the HCJ to injunct it from paying out.

CONCLUSION

[74] Appeals 1119, 1120, 1150 and 1339 are therefore allowed and the orders of the High Court are set aside. We award costs of RM 100,000 here and below to Damai, subject to allocatur. MBB and MIBB have not asked for costs of these appeals.

Appeals allowed.

Reported by Ahmad Ismail